Supreme Court, U.S.
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No. 92-

In the

Supreme Court of the United States

OCTOBER TERM, 1992

ROBERT S. HURD,
Petitioner,

v.

ELIZABETH ANN HURD,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION.

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Question Presented.

Respondent is not aware that this case presents any substantial federal question. The petition is filed by an individual unhappy with the final judgment in his Massachusetts divorce.

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Massachusetts General Laws

c. 208, § 34 *passim*

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Summary of the Argument.

This case involves issues solely of Massachusetts law; or, in the alternative, petitioner has suffered no due process vio-

lation from the application of G.L. c. 208, § 34, a remedial statute with a proper, rational legislative purpose.

Argument.

I. Petitioner Raises No Substantial Federal Question.

This case raises issues solely of Massachusetts law. Specifically, this is a divorce action focusing on the division of the marital estate between the spouses. Because such cases present no federal question, this Court has historically refused to hear them. "It has been understood that 'the whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the states and not to the laws of the United States' . . . and the jurisdiction of the Courts of the United States over divorces and alimony always has been denied." *Popovici* v. *Agler*, 280 U.S. 379, 383 (1930), *citing Ex parte Burns*, 136 U.S. 586, 593-594 (1890), *Barber* v. *Barber*, 21 How. 582 (1858), *Simms* v. *Simms*, 175 U.S. 162, 167 (1899), *De La Rama* v. *De La Rama*, 201 U.S. 303, 307 (1906). Domestic relations cases pose issues of "intensely local interest," *United States* v. *Yazell*, 382 U.S. 341, 349 (1966), requiring a familiarity and expertise with state laws and economic factors which only the state courts possess. *Rose* v. *Rose*, 481 U.S. 619 (1986).

While a federal court may override state interests and assume jurisdiction of a domestic relations case, it may do so only in the rare case "where clear and substantial interests of the National Government, which cannot be served consistently with respect for such state interests, will suffer major damage if the state law is applied." *Yazell*, 358 U.S. at 352 (finding no federal interest in over-riding Texas law on coverture to permit Small Business Administration to collect on a contract). As the cases cited by petitioner indicate, federal courts have found

such a clear and substantial interest in divorce cases only when state and federal laws conflict over the allocation of a federal entitlement. *E.g.*, *Ridgeway* v. *Ridgeway*, 454 U.S. 46 (1981) (concerning an insured's designation as beneficiary under a policy issued pursuant to the Servicemen's Group Life Act); *Mansell* v. *Mansell*, 490 U.S. 581 (1989) (involving military retirement pay as property divisible upon divorce); and *Hisquierdo* v. *Hisquierdo*, 439 U.S. 572 (1979) (concerning whether benefits received under The Railroad Retirement Act of 1974 were community property).

Failing to have any federal entitlement at issue, petitioner attempts to create a federal question by claiming a violation of his right to due process under the Fourteenth Amendment of the United States Constitution as a result of an allegedly "retroactive" application of Massachusetts General Laws Chapter 208, Section 34 ("G.L. c. 208, § 34"). However, no such constitutional issue arises here, since G.L. c. 208, § 34 acts purely in a prospective matter. The Massachusetts legislature amended G.L. c. 208, § 34 on July 19, 1974, to include, *inter alia*, inherited property as part of the marital estate which may be divided upon divorce. On July 19, 1974, petitioner was still married to respondent, and G.L. c. 208, § 34 did not effect him in any way. General Laws c. 208, § 34 did not divest petitioner of any money received from The Robert S. Hurd Trust (the "Trust"), a revocable trust established by petitioner as a vehicle to manage his personal investments. Neither did G.L. c. 208, § 34 transfer petitioner's income from or title to the Trust. Instead, petitioner continued to receive money from the Trust as he always had.

Petitioner would have continued to have been unaffected by G.L. c. 208, § 34 had he remained married. However, in 1988, *long after* G.L. c. 208, § 34's amendment, he became involved in a divorce proceeding, a triggering event which then caused G.L. c. 208, § 34 to apply. A "statute which is

contingent upon an act. . . committed not before but after the enactment of the statute" is not retroactive. *Wickard* v. *Filburn*, 317 U.S. 111 (1942) (holding that a statute was prospective when it changed marketing quotas after appellant planted his crop, but before he harvested it, since the statutory penalty became incurred only upon threshing); *see also Fleming* v. *Rhodes*, 331 U.S. 100, 107 (1947) ("Federal regulation of future action based upon rights previously acquired by the person regulated is not prohibited by the constitution.")

Since G.L. c. 208, § 34 acts purely prospectively, petitioner has not been deprived retroactively of any right whatsoever, and no constitutional due process violation has occurred.

II. Even If This Court Were to Find That Petitioner Raises a Substantial Federal Question, G.L. c. 208, § 34 Does Not Deprive Petitioner of His Federal Due Process Rights.

A. *As a Statute Which Operates as a Remedial One for Individuals Married at its Enactment, G.L. c. 208, § 34 Cannot Fairly be Described as "Retroactive".*

Petitioner argues that because it was enacted after his inheritances (but before his divorce), G.L. c. 208, § 34 has been applied retroactively. This operation is not a "retroactivity" that violates petitioner's federal constitutional right to due process under the Fourteenth Amendment.[1] Petitioner mischarac-

[1] While respondent is not aware that this issue has yet been decided in the federal courts, several state courts have decided that equitable property division statutes pose no federal constitutional due process violation. *Valladares* v. *Valladares*, 80 A.D.2d 244, 438 N.Y.S.2d 810 (1981), *aff'd*, 55 N.Y.2d 388, 434 N.E.2d 1054, 449 N.Y.S.2d (1982), *modified sub nom.*, *Tucker* v. *Tucker*, 55 N.Y.2d 378, 434 N.E.2d 1050, 449 N.Y.S.2d 683 (1982); *Fournier* v. *Fournier*, 376 A.2d 100 (Me. 1977); *McCree* v. *McCree*, 464 A.2d 922 (D.C. 1982); *Booth* v. *Booth*, 7 Va. App. 22, 371 S.E.2d 569 (1988).

terizes his position as having been deprived of a property right without due process of law. General Laws c. 208, § 34, however, does not alter the substantive rights of petitioner or of anyone else, for it is solely applicable prospectively for individuals married at its enactment. *See Ross* v. *Ross*, 385 Mass. 30, 430 N.E.2d 815 (1982). Retroactive application of the statute would be a case where the parties were divorced prior to the statute's enactment. A modification in such a case based on the later adopted statute would violate the Massachusetts contribution. *Hay* v. *Cloutier*, 389 Mass. 248, 449 N.E.2d 361 (1983).

When a statute alters only a remedy or a procedure, no constitutional bar prevents it from applying to an act occurring after the statute's enactment. *Ross*, 430 N.E.2d 815; *Ettor* v. *Tacoma*, 228 U.S. 148, 155 (1913) ("Matters which belong to the remedy are subject to change and alteration, and even repeal, provided the legislation does not operate to impair a contract or deprive one of a vested property right."); *Brown* v. *General Services Administration*, 507 F. 2d 1300 (2d Cir. 1974), *aff'd*, 425 U.S. 820 (1975). Traditionally, state courts have issued orders dividing marriage property as one of the remedies available upon divorce. General Laws c. 208, § 34, before its amendment, permitted Massachusetts courts to distribute the marital estate between the spouses. Under current G.L. c. 208, § 34, Massachusetts courts continue this distribution, the only change, if any, being that the present statute merely modifies and expands the relief now available upon divorces occurring after its enactment. It creates no new obligations.

While petitioner argues he has been deprived of a property right in his revocable Trust, his argument really claims he has been deprived of a right to a particular remedy. Yet, no one, including petitioner, has a right to a particular remedy. *See Mahroom* v. *Hook*, 563 F.2d 1369, 1373 (9th Cir. 1977), *cert. denied*, 436 U.S. 904 (1978). The petitioner's use of the in-

come be received from his property continued unabated for sixteen years after the amendment of G.L. c. 208, § 34. In 1990, however, when petitioner received his divorce, the remedy for executing that divorce included a fair division of the marital estate, including his revocable Trust over which he controlled dominion. Now, sixteen years after the amendment of G.L. c. 208, § 34, petitioner cannot attempt to convert a remedy into a right and thereby exclude the Trust forever from the division of the marital estate.

B. *The Rational Purpose of Serving the Public's Welfare Justifies the Application of G.L. c. 208, § 34 to Parties Divorcing after its Enactment.*

Even if petitioner were correct in asserting that G.L. c. 208, § 34 deprives him of a property right, G.L. c. 208, § 34 still commits no violation of his constitutional right to due process. "Legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations . . . This is true even though the effect of the legislation is to impose a new duty or liability based on past acts." *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 16 (1975) (citations omitted). One complaining of a due process violation has the burden of proving that the legislature has acted arbitrarily and irrationally. *Id.* at 15. A rational legislative purpose justifies the application of a statute to parties divorcing after its enactment. *See Pension Benefit Guaranty Corp.* v. *R.A. Gray Co.*, 467 U.S. 717 (1984), *cert. denied*, 467 U.S. 1259 (1984).

Massachusetts has acted rationally by protecting its citizens. General Laws c. 208, § 34 serves the general public by preventing divorced individuals from becoming public charges; by recognizing the importance of parties' economic and non-economic contributions to the marital enterprise; and by treating marriage as a type of partnership. This goal of serving the public's general welfare constitutes a rational legislative purpose.

Further proof of the rational legislative purpose of G.L. c. 208, § 34 lies in an examination of the property division scheme which petitioner advocates. Petitioner's argument, if accepted, would result in an inherently unfair, inconsistent, complex property division mechanism in Massachusetts divorces. Petitioner would require Massachusetts courts to treat divorce cases filed on the same date differently from one other, all depending upon when and how property was derived, or alleged to be derived, through inheritance. Further, petitioner's argument would dictate that a court deciding a single divorce case examine each piece of inherited property individually to determine when it was received, with inheritances received before the enactment treated differently from those received before the enactment. This scheme of administrative chaos and unfairness would linger on for generations before it could be executed with any degree of uniformity. Such a result is impossible and unfair under the circumstances.

Conclusion.

This court should deny this petition, as it presents no substantial federal question and as petitioner has suffered no violation of his right to due process under the Fourteenth Amendment of the Constitution.

Respectfully submitted,

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Addendum.

Massachusetts General Laws.

208:34. Alimony; assignment of estate; rights and funds accrued during marriage; determination of amount of alimony or value of property; health insurance.

[Text as amended by 1990, 467 effective March 29, 1991. For text effective until March 29, 1991, see above.]

Section 34. Upon divorce or upon a complaint in an action brought at any time after a divorce, whether such a divorce has been adjudged in this commonwealth or another jurisdiction, the court of the commonwealth, provided there is personal jurisdiction over both parties, may make a judgment for either of the parties to pay alimony to the other. In addition to or in lieu of a judgment to pay alimony, the court may assign to either husband or wife all or any part of the estate of the other, including but not limited to, all vested and nonvested benefits, rights and funds accrued during the marriage and which shall include, but not be limited to, retirement benefits, military retirement benefits if qualified under and to the extent provided by federal law, pension, profit-sharing, annuity, deferred compensation and insurance. In determining the amount of alimony, if any, to be paid, or in fixing the nature and value of the property, if any, to be so assigned, the court, after hearing the witnesses, if any, of each party, shall consider the length of the marriage, the conduct of the parties during the marriage, the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities and needs of each of the parties and the opportunity of each for future acquisition of capital assets and income. In fixing the nature and value of the property to be so assigned, the court shall also consider the present and future needs of the dependent children of the marriage. The court may also consider the contribution of each of the parties in the acquisition, preservation or appreciation in value of their respective estates and the contribution of each of the parties as a homemaker to the family unit. When the court makes an order for alimony on behalf of a spouse, said court shall determine whether the obligor under such order has health insurance or other health coverage available to him through an employer or organization or has health insurance or other health coverage available to him at reason-

able cost that may be extended to cover the spouse for whom support is ordered. When said court has determined that the obligor has such insurance or coverage available to him, said court shall include in the support order a requirement that the obligor do one of the following: exercise the option of additional coverage in favor of the spouse, obtain coverage for the spouse, or reimburse the spouse for the cost of health insurance. In no event shall the order for alimony be reduced as a result of the obligor's cost for health insurance coverage for the spouse.